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04-967

In the Supreme Court of the United States

Norma McCorvey,
Petitioner

v.

William "Bill" Hill,
Respondent

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

Brief *Amicus Curiae* of
Texas Black Americans for Life, Inc.,
and the
Life Education And Resource Network, Inc. (LEARN)

In Support of the Petitioner

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Interest of the *Amici* And Consent

The *amici*,[1] Texas Black Americans for Life, Inc., and the Life Education And Resource Network, Inc. (LEARN), educate people about genocidal aspects of abortion, and were *amici* in the Fifth Circuit. All parties granted consent to the *amici* to file this brief.

Summary of Arguments

In affirming the district court, the Fifth Circuit did one of three things: First, this case may be looked at as one in which the Fifth Circuit decided an important question of federal law which has not been, but which should be, decided by this Court. The question is whether, or under what circumstances, a lower court, when faced with a possible jurisdictional defect, may summarily dismiss, or must give fair notice and an opportunity to be heard regarding the alleged defect.

We argue that although it may be proper for a court to dismiss summarily when the defect is based on objectively ascertainable facts (such as where a filing is jurisdictionally out of time), this Court must now expound a rule saying that a court must not dismiss summarily, but must give fair notice and an opportunity to be heard, where the possible defect is based on a question of law and is more naturally the subject of briefing and argument than summary dismissal.

Because the Fifth Circuit based its decision on its understanding of the repeal of a state statute by implication, this precedent could be widely used in many different types of cases, producing other erroneous results and erroneous advice to counsel. And if this Court now leaves standing such

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[1] Counsel of record on this brief is the sole author of this brief. No person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

an obvious departure from due process, people will wonder whether this Court refused to deal with this issue simply because this is an abortion case, with "the wrong side" looking for justice, especially if this Court finds in a later case that it must then correct such an obvious departure from due process.

Second, in the alternative, if this Court does not deem this case to involve a new question of federal law, but rather a new application of old federal law, we argue that the Fifth Circuit decided an important question of federal law in a way that conflicts with relevant decisions of this Court regarding summary dismissal for lack of subject-matter jurisdiction and with the decisions of this Court which also generally obligate the courts to give fair notice and an opportunity to be heard.

Third, in the alternative yet again, by basing its decision on a point which had not been raised previously in the case, by canceling without notice or explanation the very oral argument at which the court could have asked counsel about this perceived jurisdictional flaw, and by denying the petition for a rehearing (which would have given counsel the chance to brief and argue the point), the Fifth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

In addition, the Fifth Circuit decided this case in a way which conflicts with the Seventh Circuit, which deemed it an abuse of discretion to dismiss for lack of subject matter jurisdiction when it was possible for the plaintiff to allege jurisdiction.

The Court will soon face cases involving fetal pain, starting with the federal partial-birth abortion cases. And now there is talk of a possible federal statute which would require doctors to tell pregnant mothers contemplating abortion that their unborn child will feel the pain of the procedure, and offer an

anesthetic for the child.[2] We then point out that *Roe v. Wade*[3] has caused great social unrest and damage even to this Court itself thus far, and that this damage is about to become worse as these pain-related cases arrive. This Court will not want to go into those cases alone. It will best posture itself to review those cases while the 5,347 pages of documents which the petitioner filed in the district court, including the affidavits of over 1,000 other women, are still under review in the proper evidentiary hearings.

Throughout all this, the Court should avoid a repeat of trying the "one big fix" approach to the subject of abortion which the Court tried to use, unsuccessfully, in *Roe* and *Planned Parenthood v. Casey*.[4] To avoid limiting its own options, and to expand its opportunities for best facing its upcoming challenges, this Court must grant certiorari.

ARGUMENTS

I. The Fifth Circuit Has Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Decided By This Court

A. The Important Question Of Federal Law:

Whether A Federal Court Must Give Fair Notice And An Opportunity To Be Heard Before Dismissal Where A Jurisdictional Defect Is Based On A Question Of Law

The Fifth Circuit based its decision on a suggestion that the statute in question had been repealed by implication, thus

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[2] Charles Babington, *Two Opponents of Abortion Are Tapped for Senate Judiciary Panel*, WASHINGTON POST, Dec. 21, 2004, at A23.

[3] *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

[4] *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

rendering the case moot.[5] On the issue of subject-matter jurisdictional defects, this Court has been clear: When faced with such a defect, a federal court must dismiss,[6] and must also search the record---even *sua sponte*, if need be---to ensure there is no defect in subject-matter jurisdiction.[7]

What has not yet been expressly stated, however, and what must now be decided by this Court, is whether, or under what circumstances, it is proper for a court in such a situation to dismiss summarily for such a defect, or dismiss only after giving fair notice and an opportunity to be heard. We submit that although a court may dismiss summarily when the jurisdictional defect is based on objectively ascertainable facts (such as where a filing is jurisdictionally out of time), it must also be the case that a court must give fair notice and an opportunity to be heard where the defect is a question of law and is more naturally the subject of briefing and argument than summary dismissal.

Fair notice and an opportunity to be heard are the very cornerstone of due process. As this Court has said,

> "The core of due process is the right to notice and a meaningful opportunity to be heard."[8]

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[5] *McCorvey v. Hill*, 385 F.3d 846, 848-849 (5th Cir. 2004).

[6] *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 1331, 89 L.Ed.2d 501, 511 (1986). (Note: The Fifth Circuit relied on *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 180, 120 S.Ct. 693, 704, 145 L.Ed.2d 610, 626 (2000). See *McCorvey*, at 385 F.3d 848. *Friends of the Earth*, in turn, relied on *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73, 117 S.Ct. 1055, 1071, 137 L.Ed.2d 170, 197 (1997), where *Bender* is cited.)

[7] *Andrus v. Charlestone Stone Products Co., Inc.*, 436 U.S. 604, 607, n. 6, 98 S.Ct. 2002, 2005, n. 6, 56 L.Ed.2d 570, 574, n. 6 (1978).

[8] *LaChance v. Erickson*, 522 U.S. 262, 266, 118 S.Ct. 753, 756, 139 L.Ed.2d 695, 700 (1998). See also, *Los Angeles v. David*, 538 U.S. 715, 716-717, 123 S.Ct. 1895, 1896, 155 L.Ed.2d 946, 949 (2003).

On that note, the Seventh Circuit has said that courts must resist the temptation "... to disregard procedural niceties, all in fulfillment of a confident sense of mission."[9]

The idea that a court, when faced with an issue of a jurisdictional defect, must give fair notice and an opportunity to be heard when the perceived jurisdictional defect is based on a argument of law, and is thus more a matter of briefing and argument than summary dismissal, is a point not yet expressly stated in this Court's jurisprudence. This case demonstrates the need for such a statement.

The point that a court should not have too heavy a hand does not seem to be lost on the Seventh Circuit, at least. We again refer this Court to what that circuit has said:

> "A court's discretion to dismiss for lack of subject matter jurisdiction when the plaintiff could have pleaded the existence of jurisdiction and when in fact such jurisdiction exists, should be exercised sparingly."[10]

We do fully agree, we should also note, that as a matter of general principle, this Court should defer to a lower court's interpretation of state law.[11] But we would also say as well that in our reading of the cases on which this doctrine is based, it would seem that those cases decided issues of state law only upon proper notice of the existence of such an issue, and full briefing and argument on the merits. That did not

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[9] *United States v. Board of School Commissioners*, 128 F.3d 507, 512 (7th Cir. 1997).

[10] *Hoefferle Truck Sales v. Divco-Wayne*, 523 F.2d 543, 549 (7th Cir. 1975).

[11] *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 204, 76 S.Ct. 273, 277, 100 L.Ed. 199, 206 (1956); *United States v. Hohri*, 482 U.S. 64, 74, n. 6, 107 S.Ct. 2246, 2253, n. 6, 96 L.Ed.2d 51, 61, n. 6 (1987).

happen in our case. Quite the opposite, in fact, was the case. In its opinion, the Fifth Circuit simply said:

> "We dispensed with oral argument in this case because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. Fed.R.App.P. 34(a)(2)."[12]

We respectfully disagree. We maintain instead that the failure to afford the petitioner fair notice and an opportunity to be heard constituted an abuse of discretion.

B. The Three Main Reasons Why This Court Should Decide This Question Of Law:

1. This Precedent Of The Fifth Circuit Will Produce Erroneous Results In Other Cases

We especially ask the Court to keep in mind that the Fifth Circuit did not base its decision on abortion law. It did not base it on constitutional law at all, in fact, other than the requirement of there being a live case and controversy, which the issue of mootness, of course, goes to. Neither did the court base its decision on Rule 60 or any of the other Federal Rules of Civil Procedure. It based it instead only on the idea of a repeal by implication, and the potential mootness resulting therefrom.[13]

The result is that this precedent, which ignores the basic right of receiving fair notice and an opportunity to be heard in considering a repeal by implication, can now be picked up in federal cases dealing with the regulation of taxicabs in Fargo, North Dakota, or the sale of goods under the Uniform

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[12] *McCorvey*, 385 F.3d at 847, n. 1.
[13] *McCorvey*, 385 F.3d at 849.

Commercial Code in Maine, Nebraska, or Hawaii. In fact, any time a federal court faces implied repeal, this case will be either governing precedent, or will be otherwise authoritative by virtue of the status of the Fifth Circuit.

2. This Precedent Of The Fifth Circuit Will Produce Erroneous Advice To Clients

This precedent in the Fifth Circuit will have an affect on how counsel will advise their clients in many different types of cases all across the country, cases which this Court might never even hear about simply because they will either be settled out of court, or perhaps because the parties will have conducted themselves differently in the way they handle the affairs of their own private lives before litigation is even considered. But how many cases and clients will be affected like that? How many *types* of cases will be affected like that? No one can know right now. And no one, in fact, ever will know if this precedent of the Fifth Circuit is left intact, though it may be followed by other courts and counsel.

3. This Court's Reputation Could Be Damaged By Denying Certiorari

What will this mean for this Court, then, if some day the Court concludes that it must finally review this due process issue in some later case? Leaving such a substantial departure from due process intact in this case, only to revisit it and modify it or overrule it in another case, will leave this Court open to the suggestion that the Court did not intervene this time only because abortion was involved, and because "the wrong side" was looking for justice. And that appearance, we submit, will impugn the integrity of this Court. This will be especially true because *Roe* still is, after all, this Court's leading current example of substantive due process. Substantive due process, though, is supposed to be supplemental to procedural due process.

How ironic, then, if this case should now also become the lead case in causing a departure from procedural due process as the lower courts follow this precedent. Letting things develop into such an ironic state of affairs would leave many shaking their heads, and would further impugn the integrity of this Court. In contrast to all of this, granting certiorari now will help nip these potential problems in the bud.

II. The Fifth Circuit Has Decided An Important Question Of Federal Law In A Way That Conflicts With Relevant Decisions Of This Court

Perhaps this Court will deem this instead to be just a new application of an old question of federal law (*i.e.*, a new duty to give fair notice and an opportunity to be heard in certain circumstances, when faced with the already-established duty to dismiss for lack of subject-matter jurisdiction). If so, we submit that the Fifth Circuit decided this case in conflict with other relevant decisions of this Court in at least two respects.

A. Dismissal Is Inappropriate Under *Steel Co. v. Citizens For A Better Environment*

Dismissal without any chance to argue the issue of a lack of subject-matter jurisdiction runs contrary to what this Court has said:

> "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction .... Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this

Court, or otherwise completely devoid of merit as not to involve a federal controversy.'"[14]

We submit that the petitioner established in the district court a basis for her Rule 60 motion which was sufficiently plausible and meritorious as to be at least *arguably* substantial, and also that it is at least *arguably* the case that the statute in question has not been repealed by implication.

B. Dismissal Violated This Court's Statements On Due Process

The Fifth Circuit apparently decided that its specific obligation to dismiss due to a jurisdictional flaw was somehow not to be read together with the other decisions of this Court which also generally obligate the courts, simultaneously, to ensure that the parties have fair notice and an opportunity to be heard in all proceedings before the court.[15] All of this, we think, is simply another way of wording the same ideas we address in our first argument, and we hereby incorporate herein by reference our statements and cases from that argument.

III. The Fifth Circuit Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Supervisory Power

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[14] *Steel Co. v. Citizens For A Better Environment*, 523 U.S. 83, 89, 118 S.Ct. 1003, 1010, 140 L.Ed.2d 210, 223-224 (1998) (quoting *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666, 94 S.Ct. 772, 777, 39 L.Ed.2d 73, 78-79 (1974)) (citations omitted).

[15] *LaChance v. Erickson*, 522 U.S. 262, 266, 118 S.Ct. 753, 756, 139 L.Ed.2d 695, 700 (1998). See also, *Los Angeles v. David*, 538 U.S. 715, 716-717, 123 S.Ct. 1895, 1896, 155 L.Ed.2d 946, 949 (2003).

By basing its decision on a point which was raised nowhere in the case,[16] by canceling without notice or explanation the very oral argument at which the court could have at least asked counsel about the perceived jurisdictional flaw, and by further denying the petition for a rehearing (which would have afforded the court and counsel the opportunity to discuss the issue in the briefing and at oral argument), the Fifth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Furthermore, the Fifth Circuit's decision to cancel oral argument seemed to come as an afterthought, coming as it did in the form of a handwritten note at the bottom of the order denying the law professors' motions to file an *amicus* brief and give oral argument thereon.[17] (A copy of that order is lodged with the clerk of this Court.)

We again submit that this is perhaps another way of looking at what we said in Arguments I and II, and we hereby incorporate herein by reference our statements and cases from those arguments.

IV. The Fifth Circuit Has Decided This Case In A Manner Which Conflicts With A Decision Of The Seventh Circuit On The Same Important Matter

As noted above in Argument I,[18] we refer to a statement of the Seventh Circuit in which that circuit took a much more dim view toward summary dismissal for lack of subject-matter jurisdiction than the Fifth Circuit took in this case.

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[16] A group known as Concerned Law Professors did raise the issue of repeal of the statute by implication in a brief which they sought to file by motion in the Fifth Circuit, but the court denied that motion.

[17] See note 16, *supra*.

[18] See note 10, *supra*, and accompanying text.

The question we now face is whether this constitutes a split of authority between the circuits on this point.

Granted, there are some differences from a split of authority in the classic sense. First, the Seventh Circuit was reviewing action taken by a district court; in the instant case, the summary dismissal was undertaken by the Fifth Circuit itself. Second, the Seventh Circuit was aware of the existence of the issue which it faced; the Fifth Circuit, by contrast, seemed to be unaware of any issue pertaining to whether its action should be summary in nature, or should come only after fair notice and an opportunity to be heard, and thus decided this question *sub silencio*.

Nonetheless, not only do these two circuits touch on the issue of whether (or under what circumstances) dismissal for a lack of subject-matter jurisdiction should be summary or not, but the action of the Fifth Circuit even goes beyond what the Seventh Circuit refused to countenance. For the Seventh Circuit rejected summary dismissal when counsel there had already neglected a duty to allege affirmatively the statutory basis of jurisdiction for quite a long time. In the instant case, by contrast, the petitioner was simply hit from out of the blue with an argument of law, the discussion of which, in inner chambers, her counsel was not even invited to attend. So counsel in the Seventh Circuit had had some notice, but the petitioner's counsel, in essence, had none. *Hoefferle Truck Sales,* we should also note, is still being followed in the Seventh Circuit,[19] and has also been followed or cited with approval by other courts.[20]

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[19] *Macklin v. United States*, 300 F.3d 814, 819-820 (7th Cir. 2002).

[20] See, *e.g.*, *Harary v. Blumenthal*, 555 F.2d 1113, 1115, n. 1 (2nd Cir. 1977), and *Cook v. United States*, 765 F.Supp. 217, 223 (M.D.Pa. 1991) (quoting *Hoefferle*: "court's discretion to dismiss for lack of subject matter jurisdiction when the plaintiff could have pleaded the existence of jurisdiction and when in fact jurisdiction exist[s] should be exercised sparingly.")

Furthermore, the very fact that the Fifth Circuit decided this issue *sub silencio* constitutes yet another reason for granting certiorari. For the issue is too important to let go *sub silencio*. And if this Court wants further development of this issue, it should, at a minimum, instruct the Fifth Circuit to consider this point and state its view expressly on whether, or under what circumstances, it is appropriate to dismiss summarily for lack of subject-matter jurisdiction, just to see if in fact the Fifth Circuit, upon express consideration of this issue, really would split with the Seventh Circuit on this point. We of course would prefer that this Court take this case to state right now that summary dismissal is inappropriate in the circumstances of a case like this. But in the alternative, this Court should at least require further development of this issue by the Fifth Circuit.

V. The Upcoming Abortion Cases Will Intensify The Harm To This Court Brought On By *Roe v. Wade*

This Court is about to face cases involving fetal pain. This will include pain inflicted in gruesome procedures taking place in the ninth month of gestation, procedures inflicted upon children who might be killed in hospitals in which other children of noticeably lesser gestational age, in rooms down the hall, are being delivered and saved, some possibly without even needing intensive care.

The cases will start with the ones involving the federal partial-birth abortion statute. Because of the proceedings in two of the three cases, this Court will face the issue of pain more squarely than it did in *Stenberg v. Carhart*.[21] In the Southern District of New York, Judge Casey held extensive evidentiary hearings on prenatal pain. Yet the evidence

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[21] *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000).

introduced therein formed no part of his decision in striking down the statute.[22] The case from the Northern District of California is even more telling of which way this issue is headed: Judge Phyllis Hamilton said in her opinion that if *Stenberg* is the law of the land, it doesn't matter if the unborn child feels pain.[23]

The Court will have to deal with the possibility that she is right. Also, an act has been proposed in Congress called the Unborn Child Pain Awareness Act. It will require doctors to tell mothers who have reached a certain stage of gestation that their child can feel the pain of the abortion, and offer an anesthetic for the child.[24]

In that light, let the Court now consider what one member of this Court who has consistently voted to uphold *Roe* has already said. We disagree with his honor on the law of abortion generally, and also with respect to at least one implication of the following statement. But perhaps the fact that even these *amici* find themselves in agreement with his honor on something substantive illustrates the unusual importance of this issue:

> "As a secular matter, there is an obvious difference between the state interest in protecting the freshly fertilized egg and the state interest in protecting a 9-month-gestated, fully sentient fetus on the eve of birth. There can be no interest in protecting the newly fertilized egg from physical pain or mental anguish, because the capacity for such suffering does not yet

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[22] *National Abortion Federation v. Ashcroft*, 330 F.Supp.2d 436 (S.D.N.Y. 2004).

[23] *Planned Parenthood Federation of America v. Ashcroft*, 320 F.Supp.2d 957, 1034 (N.D.Cal. 2004).

[24] Charles Babington, *Two Opponents of Abortion Are Tapped for Senate Judiciary Panel*, WASHINGTON POST, Dec. 21, 2004, at A23.

exist; respecting a developed fetus, however, that interest is valid."[25]

No matter what analysis this Court may use, it if strikes down the federal partial-birth abortion statute, with its pain-related implications, the Court will only inflame the issue even more. And if this Court had difficulty handling the unrest which was present in 1992, when it decided *Casey*, how is this Court going to handle what it will necessarily---unintentionally, but *necessarily*---sponsor in the near future?

This Court must also face the possibility that it could wind up deciding the fetal pain cases one way in the next couple of years, only to find that medical science has advanced a half dozen years later, bringing to light yet more facts which would undermine the basis of what the Court relied on for its decisions about fetal pain now. Locked into the straight jacket of constitutional precedent, legislatures could find themselves faced with the squarely conflicting duties of enacting laws for the sake of justice, on the one hand, while trying on the other hand to cope with the restrictions placed upon them by this Court, and by the lower courts applying what this Court might soon find itself saying in these upcoming pain cases.

Aside from the damage to society which has already ensued from *Roe* and *Casey*, the damage to this Court seems to have gotten worse since *Casey*, as was illustrated by Judge Jones in this case itself, in her unusual move of concurring in the very opinion of the court which she herself had authored.[26] Even the lay community expects the next confirmation battles for justices to this Court to be a resumption of the

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[25] *Webster v. Reproductive Health Services*, 492 U.S. at 569, 109 S.Ct. at 3084, 106 L.Ed.2d at 469 (1989) (Stevens, J., concurring in part and dissenting in part).

[26] *McCorvey*, 385 F.3d at 850 (Jones, J., concurring).

bruising spectacles which have gone before, as a recent article in *The Economist* makes clear.[27] What will then follow next for this Court, we wonder, in the wake of the pain-related cases, when they are all done?

VI. This Court Must Grant Certiorari To Resolve The Problem Which It Faces

If this Court denies certiorari, it goes into the next round of abortion cases with few options. It will face the pain-related cases head on, with little room to maneuver. It will have implicitly told the world that it is not interested in even looking at *Roe*, and that the next line of cases will be decided either by applying *Roe* full tilt, or by somehow trying to modify it again. The former approach, for the reasons stated above, will only lead to worse things than we have seen already; the latter one does likewise, and also feeds and nourishes a jurisprudence of doubt.[28]

If, however, in the wake of all the pain-related cases, and the pubic outcry attendant with them, this Court then concludes that it wants to go back and revisit *Roe* anyway, even if only just to modify it, how will it look if it then tries to dig it up? Will that look like the product of careful deliberations on its part? Or will it look more like retreat? Like caving in to pressure that it is unable to endure?

Let us now consider what the case will be if this Court grants certiorari. If so, the Court can do one of several things.

First of all, it can treat this case completely separate and distinct from the pain-related cases, including the partial-birth cases. We submit that there is more than enough

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[27] *The Coming Firestorm*, THE ECONOMIST, Jan. 1st-7th, 2005, at 19.

[28] See *Casey*, 505 U.S. at 844, 112 S.Ct. at 2803, 120 L.Ed.2d at 693 ("Liberty finds no refuge in a jurisprudence of doubt.").

substance to the nonpolitical, procedural aspects of this case to warrant granting certiorari. And remanding this case on those procedural considerations can then separate this case chronologically, by a considerable period, from the pain-related cases, if the Court should so desire.

On the other hand, the Court can consider this case with the first of the pain-related cases: the partial-birth cases. It may wish to order the parties to express their views on the possibility of consolidating this case with those, while holding this case in abeyance pending the presentation of those cases to the Court. Or it may wish to consider this case simultaneously with those cases without consolidation.

Consolidation, of course, would guarantee the intense adversarial clash which this Court prefers for its cases. We also wish to note, as we stated before,[29] that nineteen law professors sought to file an *amicus* brief in support of *Roe* in the Fifth Circuit and to give oral argument. Both motions were denied, but this does show that if the Court were to grant certiorari in this case even without consolidation, it would no doubt instantly hear from the supporters of *Roe* in the legal community, and would find itself faced with a choice of many competent organizations, law professors, and others who would be more than happy to brief their arguments and present oral argument thereon. The Court might wish to appoint a special master to advise the Court on which one or ones to allow to do so, and which others to leave in the status of *amicus curiae*, but we think this would work no hardship on, or prejudice to, the parties to this case themselves, or prove to be inconvenient for this Court.

Of course, the Court may even wish to remand this case first, while holding those other cases in abeyance pending the proceedings of this case down in the lower courts. After all,

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[29] See *supra*, notes 16 and 17, and accompanying text.

with respect to the plaintiffs' side in the partial-birth cases, the injunctions granted will still be intact the whole time; and with respect to the government's position, it will be in a far better position to argue its case in a framework in which a reconsideration of *Roe* is at least somewhat possible than it would be if a reconsideration of *Roe* were to be made more difficult by a denial of certiorari in this case. We do not mean to speak for them, of course. But the Court can order the parties to express their own opinions on such possibilities. And if the Court grants certiorari, this would immediately tell the supporters of *Roe* of this Court's renewed interest in this case, and they would no doubt then wish to defend *Roe* not only here, but also in the lower courts as well.

In any event, with *Roe* on the table for discussion at least academically, the Court need not go into the pain-related cases in a posture in which it has painted itself into a corner. Even if *Roe* is alive somewhere in the court system only with respect to procedural elements, it will take very little for this Court to open it up again to further consideration, if this Court so desires, in order to help it decide these cases in the very near future.

This can lead to a more careful deliberation, in the Court's own good time, of whether *Roe* should be reexamined, and with the most options for doing so, while the Court faces the most wrenching challenges to *Roe* that it will probably ever encounter. By contrast, this Court has already tried the "one big fix" approach to the issue of abortion twice before: in *Roe*, and in *Casey*. If those two cases illustrates anything at all, it is simply this: The "one big fix" approach has been tried, and it doesn't work. Instead, let the Court move more slowly and deliberately now, taking the time, in appropriate steps and measures, to consider the issue with greater patience, which itself, in turn, affords this Court more opportunity to apply its due diligence to the task at hand.

All things considered, then, which option would be better for this Court? We submit that this Court is much better off granting certiorari than denying it.

A. This Court's Own Statements Indicate That This Is An Opportune Moment To Grant Certiorari

In *Casey* this Court said it was hesitant to reconsider *Roe* where there had been a change of membership of the Court, coupled with a lack of any change in the facts or law, on the grounds that this would appear that it was overruling *Roe* on political grounds instead of on the basis of the rule of law.[30] This Court also said therein that it need not decide *Casey* as if *Roe* were before the Court in the first instance.[31]

We ask this Court to recognize that this case now comes before the Court in a perfect confluence of facts and circumstances for at least initiating the process of reexamining *Roe*. First of all, none of the changes in the membership of this Court since *Casey* would lead one to conclude that, if this Court were now to start the process of reexamining *Roe*, it would be acting out of a new political view of how *Roe* should have been decided in the first place.

Second, the voluminous documents which the petitioner filed in the district court showing the change in facts on a broad range of abortion-related issues generally, including documentation regarding the change (since *Roe*, and even *Casey*) in medical science's knowledge of the facts pertaining to the issue of prenatal pain specifically,[32] present this Court with a substantial basis for reconsidering *Roe* in

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[30] *Casey*, 505 U.S. at 864, 112 S.Ct. at 2813-2814, 120 L.Ed.2d at 706.

[31] *Ibid*, at 505 U.S. 871, 112 S.Ct. 2817, 120 L.Ed.2d 711.

[32] The change regarding our understanding of prenatal pain since *Roe* was noted by Judge Jones in her concurring opinion. See *McCorvey*, 385 F.3d at 852 (Jones, J., concurring).

light of an ever-changing body of facts, a body of facts which militates more and more with each passing year in favor of recognizing the proper role of a state in protecting unborn life. On that note, let the Court consider what it has said about the importance of facts and the factfinding process itself in constitutional adjudication:

> "We have frequently recognized the importance of the facts and the factfinding process in constitutional adjudication. See, *e.g.*, *Minnick v. California Dept. of Corrections*, 452 U.S. 105, 120-127 [101 S.Ct. 2211, 2219-2223, 68 L.Ed.2d 706, 717-722] (1981); *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411, 416 [84 S.Ct. 461, 465, 11 L.Ed.2d 440, 446] (1964) ('How the facts are found will often dictate the decision of federal claims'); *Townsend v. Sain*, 372 U.S. 293, 312 [83 S.Ct. 745, 756, 9 L.Ed.2d 770, 785] (1963) ('It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues'). Cf. *supra*, at 538-540, and n. 3."[33]

Third, although this case would not be before this Court in the first instance if the Court grants certiorari, it is nevertheless the exact same case itself, and it is the exact same plaintiff herself, a woman who is now seeking to have this Court recognize her right to have her own case reexamined at trial (for the sake of her reputation in the community and conscience, if nothing else), a woman who comes to court fully prepared to show this Court why and how it can begin the process of stopping at least some of the damage she feels she is responsible for, and how it can begin the process of reexamining its lead case in this most challenging field of law.

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[33] *Bender*, 475 U.S. at 542, n. 5, 106 S.Ct. at 1331, n. 5, 89 L.Ed.2d at 511, n. 5.

This is such a rare opportunity for this Court. When previously has the Court ever had the chance to have the lead plaintiff in one of its landmark cases come back and ask the Court if she can show it, through great detail in an evidentiary hearing, what it needs to know now in order to reconsider her case, especially in light of ever-changing facts and knowledge, and changes in our body of law?

Given the fact that this Court might soon find itself in a posture in which it would want to take advantage of all, or at least some, of the opportunities which this case can offer, could it not be said that the more prudent course to follow here would be to grant certiorari?

We do not see how this Court can feel comfortable denying certiorari, knowing that such a denial means that very soon it will go into the upcoming challenges before it and face them alone. For in those cases, this Court will then truly face the acid test of whether it can, within the framework of *Roe* as it now exists, balance the interests of the mother with "... the state interest in protecting a 9-month-gestated, fully sentient fetus on the eve of birth."[34]

Conclusion

Wherefore, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,
Lawrence J. Joyce
Counsel of record

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[34] *Webster v. Reproductive Health Services*, 492 U.S. at 569, 109 S.Ct. at 3084, 106 L.Ed.2d at 469 (1989) (Stevens, J., concurring in part and dissenting in part).